IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

CHRISTINA M. FANASE, individually and as Beneficiary of a certain life insurance policy of DEBBILOU SWABADO, deceased, Plaintiff, v. LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, Defendant.	))))))))))))	**C.A. No.: 5:10-CV-92** **Judge Frederick P. Stamp, Jr.**

REPORT OF THE PARTIES' INITIAL PLANNING MEETING

This case is an action seeking life insurance benefits under the provisions of an employee benefit plan pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq. In accord with the Court's Order dated September 14, 2010 (Dkt. No. 6) the Parties have conferred and report as follows:

1. Pursuant to Federal Rules of Civil Procedure 16 and 26(f), Local Rule 16.01(b), and this Court's "First Order and Notice Regarding Discovery and Scheduling," the following persons participated in a planning conference on October 18, 2010, by telephone:

Jay T. McCamic for Plaintiff

Michael G. Gallaway and Robert M. Wood (*Pro Hac Vice*) for Defendant Liberty Life Assurance Company of Boston ("Defendant" or "Liberty Life")

2. Initial Disclosures. In accordance with the Court's "First Order and Notice Regarding Discovery and Scheduling," the parties shall exchange initial disclosures as required under Federal Rule of Civil Procedure 26(a)(1) on or before November 15, 2010.

3. Discovery Plan. While the Parties are in disagreement regarding the appropriate

scope of discovery, as indicated by their respective positions stated below, the Parties agree that resolution of this issue is premature until such time as specific discovery, if any, has been propounded by Plaintiff. Therefore, for purposes of this report, the Parties agree that determination of the appropriate scope of discovery should be resolved, if necessary, via a motion to compel or for a protective order, and that it will not be necessary to address the issue at a scheduling conference.

a. Discovery will be needed on the following subjects:

Plaintiff's Position:

Plaintiff intends to file discovery requests that may be necessary and are within the parameters allowable in this type of claim which are well established by the rules and relevant case law. See e.g. *Denmark v. Liberty Life Assur. Co. of Boston,* 566 F.3d 1 (1st Cir. 2009)

Defendant's Position:

Plaintiff has asserted a claim for life insurance benefits allegedly due under an employee welfare benefit plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq. Defendant's position is that there are no circumstances in this matter that warrant expansion of the scope of discovery beyond verification of the Policy and the Administrative Record for Plaintiff's claim. Liberty Life will provide Plaintiff with a sworn affidavit by its Custodian of Records attesting to the completeness of the Administrative Record with Liberty Life's Rule 26(a)(1) disclosures. As will be demonstrated by the verified plan documents, benefits for the LTD Plan at issue are provided by a Group Disability Income Policy ("Policy") issued by Liberty Life to Plaintiff's employer. Pursuant to the terms of the Policy, Liberty Life possesses sole authority and discretion for interpretation of the Policy and for determination of claims thereunder. As such, Defendant's position is that the Court's review of Liberty Life's decision regarding Plaintiff's claim is limited to the information available to and considered by Liberty Life at the time of its decision. Accordingly, Defendant contends that any information beyond verification of the contents of the Administrative Record is not relevant to the claims or defenses of any party and is inadmissible as a matter of law.

Defendant is aware that some courts have allowed limited discovery in ERISA benefits matters regarding the nature and effect of a conflict of interest that may arise when a claims administrator both pays for and makes a claim determination. Defendant believes there are substantial, good faith arguments in opposition to these decisions. Nevertheless, while preserving its objections for potential future review, Defendant is prepared to consider Plaintiff's proposed discovery requests and identify its specific objections, if any, to specific requests. Thus, while the Parties are in disagreement regarding the appropriate scope of discovery, Defendant believes that resolution of this issue is premature until such time as specific discovery, if any, has been propounded by Plaintiff. Therefore, for purposes of this report, Defendant proposes that determination of the appropriate scope of discovery should be resolved, if necessary, via a motion to compel or for a protective order. In the alternative, Defendant suggests that Plaintiff submit her proposed discovery requests by motion to the Court, and Defendant can then file its response with the Court.

b. Disclosure of electronically stored information: The Parties do not anticipate in this particular case that there will be a need for discovery of electronically stored information. Liberty Life will provide Plaintiff with the complete Administrative Record and any plan documents in its possession with Defendant's Rule 26(a)(1) disclosures. These documents will include hard copies of Liberty Life's electronic records regarding Plaintiff's claim and administrative appeal. If a dispute arises regarding electronic discovery, the Parties agree they will bring to the Court any dispute that they are unable to resolve between themselves by an appropriate motion.

c. Privilege: The Parties agree that claims of privilege or of protection as trial-preparation material asserted after production shall be addressed in accordance with Rule 26(b)(5)(B).

d. Commencement and Completion of Discovery: Discovery, if allowed by the Court, may commence after the exchange of the Parties' Rule 26(a)(1) disclosures. Discovery shall be completed no later than March 31, 2011.

e. Maximum number of interrogatories, if permitted by the Court: 25, including all subparts.

f. Maximum number of requests for production, if permitted by the Court: 25.

g. Maximum number of depositions, if permitted by the Court: 3.

h. Depositions shall be limited to a maximum of 4 hours for witnesses, 7 hours for Parties.

i. Identification of Experts, if any, and service of Expert Reports, if any, under Rule 26(a)(2) are due:

(i) By Plaintiff: November 30, 2010.

(ii) By Defendant: December 31, 2010.

(iii) Rebuttal Experts: January 31, 2011.

Plaintiff's Position:

Plaintiff intends to offer expert testimony to rebut the medical/forensic aspects of the position taken by the defendant Insurance company which were based upon its forensic medical review.

Defendant's Position:

Defendant's position is that the use of experts is inappropriate in this ERISA claim for benefits matter and, accordingly, that there is no need to establish dates for disclosures pursuant to Rule 26(a)(2). To the extent the use of experts is permitted by the Court, Defendant is agreeable to the above schedule.

j. Supplementation required under Rule 26(e) shall be provided as soon as reasonably possible, expected ordinarily to be within 30 days of discovery of the need to supplement.

4. Other Items

a. The Parties do not request a conference with the Court prior to entry of the scheduling order.

b. Pre-trial Conference: Two weeks before scheduled trial date.

Plaintiff's Position:

Plaintiff does not waive her constitutional right to a jury trial and requests the same. Some courts have held that a bench trial is appropriate in this type of ERISA claim. At any rate pre-trial and trial dates need be set.

Defendant's Position:

Defendant's position is that this ERISA benefits matter would be most appropriately resolved by cross-motions for judgment on a stipulated record, and that there is no need to establish dates for a trial or related pre-trial activities. Bynum v. CIGNA Healthcare of N.C., Inc., 287 F.3d 305, 311 n.14 (4th Cir. 2002). To the extent the Court wishes to set such dates, Defendant is agreeable to the proposed date above.

However, regarding Plaintiff's position on a trial by jury, controlling precedent, as demonstrated in Defendant's pending motion to strike in this matter, precludes jury trials for actions subject to ERISA. Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985) (holding district court erred in submitting ERISA matter to jury and noting that "Courts addressing this issue have almost uniformly held that under the common law of trusts proceedings to determine rights under employee benefit plans are equitable in character and thus a matter for a judge, not a jury"); Phelps v. C.T. Enterprises, 394 F.3d 213, 222 (4th Cir. S.C. 2005) (no jury trial available for claims under 29 U.S.C. § 1132(a)(3) of ERISA); Moore v. Life Ins. Co. of North America, 2006 U.S. Dist. LEXIS 71897 at * 25 (N.D.W.Va. Sept. 29, 2006) ("[a]ctions under ERISA are equitable actions and there is no right to a jury trial").

c. Amendment of Pleadings/Joinder of New Parties by Plaintiff: November 30, 2010.

d. Amendment of Pleadings/Joinder of New Parties by Defendant: December 31, 2010.

e. Dispositive Motions: May 2, 2011.

Plaintiff's Position:

Plaintiff does not waive her constitutional right to a jury trial and requests the same. Some courts have held that a bench trial is appropriate in this type of ERISA claim. Plaintiff believes that either party has the right to file for a summary judgment should the discovered facts indicate such is appropriate under the rules.

Defendant's Position:

Defendant's position is that this ERISA benefits matter would be most appropriately resolved by cross-motions for judgment on a stipulated record. Bynum v. CIGNA Healthcare of N.C., Inc., 287 F.3d 305, 311 n.14 (4th Cir. 2002).

Regarding Plaintiff's position on a trial by jury, controlling precedent, as demonstrated in Defendant's pending motion to strike in this matter, precludes jury trials for actions subject to ERISA. Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir. 1985) (holding district court erred in submitting ERISA matter to jury and noting that "Courts addressing this issue have almost uniformly held that under the common law of trusts proceedings to determine rights under employee benefit plans are equitable in character and thus a matter for a judge, not a jury"); Phelps v. C.T. Enterprises, 394 F.3d 213, 222 (4th Cir. S.C. 2005) (no jury trial available for claims under 29 U.S.C. § 1132(a)(3) of ERISA); Moore v. Life Ins. Co. of North America, 2006 U.S. Dist. LEXIS 71897 at * 25 (N.D.W.Va. Sept. 29, 2006) ("[a]ctions under ERISA are equitable actions and there is no right to a jury trial").

f. Prospects for Settlement: The Parties agree the prospects for settlement will be clearer after the exchange of Rule 26(a)(1) disclosures.

g. Alternative Dispute Resolution: The Parties agree that mediation may be helpful in exploring settlement and that mediation should be completed no later than March 31, 2011.

h. Submissions Under Rule 26(a)(3): Four weeks before scheduled trial date.

Plaintiff's Position:

See Plaintiff's position as stated above.

Defendant's Position:

Defendant's position is that this ERISA benefits matter would be most appropriately resolved by cross-motions for judgment on a stipulated record, and that there is no need to establish dates for a trial or related pre-trial activities. Bynum v. CIGNA Healthcare of N.C., Inc., 287 F.3d 305, 311 n.14 (4th Cir. 2002). To the extent the Court wishes to set such dates, Defendant is agreeable to the proposed date above.

i. Objections Under Rule 26(a)(3): Two weeks before scheduled trial date.

Plaintiff's Position:

See Plaintiff's position as stated above.

Defendant's Position:

Defendant's position is that this ERISA benefits matter would be most appropriately resolved by cross-motions for judgment on a stipulated record, and that there is no need to establish dates for a trial or related pre-trial activities. Bynum v. CIGNA Healthcare of

N.C., Inc., 287 F.3d 305, 311 n.14 (4th Cir. 2002). To the extent the Court wishes to set such dates, Defendant is agreeable to the proposed date above.

k. Other matters: The Parties are not currently aware of any addition issues that require the Court's attention.

5. Matters to Be Addressed Pursuant to Local Rule 16.01(b)(1)-(5):

a. Complex Case Management: The Parties agree that this action is not suitable for designation as a complex case requiring special case management procedures and additional pretrial conferences.

b. Stipulations of Fact: The Parties will file any stipulations that may be helpful to the Court in re-solving the case on or before the deadline for dispositive motions.

c. Magistrate Judge: The Parties do not consent to trial by a magistrate judge.

d. Mediation: The Parties are agreeable to private mediation, as indicated in Paragraph 4.g., above.

e. Scheduling Conference Agenda: The Parties do not believe a scheduling conference will be necessary. If the Court should decide otherwise, the Parties will provide a joint proposed agenda within 14 days of the Court's order setting the scheduling conference.

Dated this 26th day of October, 2010.

By: s/ Michael G. Gallaway
Michael G. Gallaway (W. Va. Bar #5071)
SPILMAN THOMAS & BATTLE, PLLC
1217 Chapline Street
Post Office Box 831
Wheeling, WV 26003-8731
304.230.6950 (T)
304.230.6951 (F)

and

By: s/ Robert M. Wood
Robert M. Wood (*Pro Hac Vice*)
JACKSON LEWIS LLP
Company of Boston
One Liberty Square
55 Beattie Place, Suite 800
Greenville, South Carolina 29601
864.232.7000 (T)
864-235-1381 (F)
Attorneys for Defendant Liberty Life Assurance Company of Boston

and

By: s/ Jay T. McCamic
Jay T. McCamic
MCCAMIC, SACCO, PIZZUTI & MCCOID, PLLC
56-58 Fourteenth Street
Wheeling, West Virginia 26003
Counsel for Plaintiff